Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:	)	
	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

To: The Commission

COMMENTS OF BUCKEYE CABLEVISION, INC.

BUCKEYE CABLEVISION, INC.

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May 13, 1996

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COMMENTS OF BUCKEYE CABLEVISION, INC.

Buckeye Cablevision, Inc. ("Buckeye") hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding dealing with Leased Commercial Access. These comments are filed to demonstrate the effect of the Commission's proposed cost/market rate formula and to address other leased access issues that cause us great concern.

I. Introduction and Summary

Based on its past experience with leased commercial access and the anticipated impact of the formula for determining leased channel rates proposed in the FNPRM, Buckeye, operator of a cable television system serving approximately 127,000 subscribers in Toledo, Ohio, urges the Commission not to adopt the cost/market rate formula. To do so would be inconsistent with the Commission's own objectives as articulated in the FNPRM and also with Congressional goals in enacting a statutory leased access requirement:

1. Contrary to the Commission's intent, as expressed in the FNPRM, rates determined in accordance with the proposed cost/market formula for Buckeye Cablevision's system would be at or near zero.

2. On Buckeye Cablevisions's cable system (and, we suspect, on many others), the proposed formula would decrease rather than increase the diversity of programming services. The prospect of free or extremely low cost access would give rise to greatly increased demand for channels. Such demand could be satisfied only through deletion of existing channels. Among the services likely to be supplanted by leased programming on our system would be a popular community channel that features coverage of local high school sports, televised meetings of the City Council and community-based religious and Hispanic programs. This is directly contradictory to Congress's intent that leased access contribute greater diversity to cable television offerings.

As an alternative to the current proposed formula, Buckeye suggests an approach that takes into account certain important operator losses (which the Commission acknowledges but fails to take into account because such losses allegedly cannot be quantified). Buckeye also suggests modifications to aspects of the Commission's proposal involving timing of establishment of lease rates, part-time carriage and use of an independent certified public accountant to review leased access rates in the event of disputes.

II. Buckeye Cablevision's Experience with Leased Access

The Buckeye Cablevision system currently has a channel capacity of 61, of which 19 channels are offered on basic, 27 on an expanded tier known as "Satellite Channels", five are offered a la carte and on a New Product Tier, nine are used for premium or pay-per-view services and one is reserved for addition of a new service. Of these channels, only three are affiliated with the system, and only one of these falls totally under its editorial control.[1] These channels contribute significantly to the diversity of programming on the cable system.

"TV 5," a local origination channel, is run much like an independent television station and provides a local outlet for programming not available in the local TV market. An affiliate of the Warner Brothers Network, "TV 5" carries professional and college sports that are in demand in the area but that are not carried by local television stations. Although the Detroit Tigers are carried by local TV stations, many residents of our area follow the Cleveland Indians or Cincinnati Reds This prompted development of "Buckeye Baseball," featuring coverage of Ohio major league baseball on "TV 5." Similarly, "TV 5" provides local distribution of popular college sports of the Mid-America Conference (of which the University of Toledo and near-by Bowling Green State University are members) and of Ohio State University and other Big Ten

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[1] The system currently leases a channel to The Toledo Blade, an affiliated publication, but the system has no control over content on this channel. In addition, although the system is involved in selection and scheduling of programming on the Community Channel, it has no editorial control over the content of specific programs that are submitted by community organizations or individuals.

Conference schools, when such events are not carried locally over-the-air. Our local Community Channel features televised City Council meetings, candidate debates, coverage of local high school sports, local religious and foreign language programming, and other programs submitted by members of the Community and local organization. If not for Buckeye Cablevision's sponsorship and production support of the Community Channel, these programs would not be available to the community.

During the last year and a half, our system filled the requests of three leased access programmers who felt our rates under the existing rules were both affordable and fair. These channel lessees used their leased channels for a Middle East ethnic program, to conduct tests of pilot television programs and to televise horse racing from a local racetrack. In addition, each requested part-time channel use, with usage ranging from periodic blocks of one hour or several hours to regular use of eighteen hours per week. Two of these lessees continue leasing time on the system today. Perhaps this is an indication that leased access can be used more successfully for targeted, local programming efforts (which truly enhance diversity) than for launching national networks that duplicate existing services. During the same period, the system received eleven requests for leased access that the programmers elected not to pursue for reasons undisclosed to us, however, none of these programmers stated that our rates were too high to permit them to go forward. Of these requests, six were for shopping or infomercial purposes, one was for religious programming and four were for unknown purposes.

Although an upgrade to increase channel capacity is planned, channel capacity currently is in short supply. As noted below, our system currently leases channel capacity pursuant to the Commission's rules; however, we could accommodate an abrupt and marked increase in demand for leased channels only by deleting existing programming.

III. Conflict Between the Proposed Cost/Market Formula and Commission Objectives

Our overriding concern with the cost/market rate formula as proposed in the FNPRM is that it will produce rates that are extremely low, if not free. In the FNPRM, the Commission stated that free access was not its goal: "We believe that our goal in determining a maximum reasonable rate should be to promote the statutory objectives of competition and diversity in programming sources without financially burdening the operators, rather than to develop a price that will necessarily be lower or higher than the highest implicit fee." See FNPRM at paragraph 28. The first step of the proposed cost formula is to designate the nine channels that we would bump to meet our set aside requirement. Although the channels are not identified by name on the analysis, our bumped channels could very well include programming such as C-Span, C-Span2, BET, Lifetime, a popular shopping channel, our Community Channel, a network broadcaster from Detroit, and a broadcaster from Canada which provides our customers with international programming.

In paragraph 68 of the FNPRM, the Commission states that the purpose of the proposed cost formula is not to lower rates. Attachment A is an analysis of what our leased access rates could be under the proposed formula. As shown, our leased access rate for a channel on our CATV Basic tier would be free and only $3.33/hr on our satellite tier (i.e. expanded basic tier). The rates are so low, or free, because the channels that we would designate to bump have little or no "lost opportunity costs" as defined by the FNPRM. For the most part, we do not insert advertising on the channels, nor do they cost us any license fees.

In paragraph 61 of the FNPRM, the Commission agrees that the value of leased access channels is the opportunity cost imposed on the operator from the lost chance to program these channels, and while the Commission recognizes that loss of subscribership is a possibility due to popular channels being bumped, these factors of "value" are not included in the proposed formula because they are not easily quantifiable. The Commission has proposed to only consider "direct" lost revenues (such as lost advertising revenues from a bumped channel) in the formula and to ignore the "indirect" lost revenues. What is the lost opportunity cost from having to use a channel for leased access versus using it for an unlaunched popular advertising supported channel, pay per view channel, or premium channel? What could be the loss of subscribers to competitors because of popular channels that were bumped in favor of infomercial or low-budget leased access programmers? What is the effect of upset customers on future communication services and programming services that operators plan to launch?

Clearly, the Commission recognizes the possibility of these costs; however, instead of the formula having a factor for lost quality or reduced programming value, the proposed formula ignores the issue. Because the formula does not address the value of a channel from the subscribers' point of view, it results in rates so low, or free, that there is no doubt that leased access programming will proliferate, at the expense of existing or not-yet-launched, valued programming services. What customer of ours would still be satisfied paying the same rate, but has had nine channels replaced by duplicative home shopping, infomercial channels or underfunded leased access programmers?

There are many different channels that want to get launched on cable systems across the country, and when channel capacity is very limited, as it is now for most systems, an operator must always address the issue of what value does this channel bring to the subscriber base, not just what direct revenues such as advertising can be earned from a channel. Most importantly, will the channel meet the demand that subscribers express? For most programmers desiring launch, leased access is not an option because their programming is of high quality and they must be paid by the operator in the form of license fees to cover those costs. Only programmers who do not have high production costs, or can cover their costs via selling products on their shows, can afford a launch whereby they pay the operator. However, these programmers, in general, do not meet the demands of subscribers in a tight channel capacity environment. Consequently, since the concept of a channel's value to the subscriber is a real and recognized issue, it cannot be ignored in the proposed cost/market formula.

For our system, our current leased access rates under the highest implicit fee formula are $104 per hour on the expanded basic tier and $131 per hour on the CATV

Basic tier. We have had programmers willing to pay those rates. We believe they are reasonable considering that the average price for a 30 second commercial from 4:00 pm to midnight is $28. Given that there are generally two minutes per hour for advertising inserts (four commercials), advertisers are willing to pay $112 for only two minutes of programming.

IV. <u>Commission and Congressional Program Diversity Goals</u>

As stated in paragraph 2 of the Order on Reconsideration, the goal of the 1984 Cable Act, as amended by the 1992 Cable Act, was to promote diversity of programming, by parties unaffiliated with the cable operator, free from the editorial control of the operator. We believe, for operators our size, this is already being accomplished. As noted above, of the 61 channels that we program, only two are affiliated with us and falls under our editorial control. Ironically, if faced with an immediate increased demand for leased channel capacity, we would be forced to eliminate some of the most diverse programming on our system. To avoid contractual and other problems, we would be forced to delete some of the primary sources of community-based news and information, ethnic programming and other public affairs channels, some of which are available to our service area only on cable. Bumping of existing channels that subscribers value in favor of leased access programmers which tend to be shopping or infomercial services or underfunded programmers will result in upset customers, a lower quality product shown on our system, and, most importantly, the loss of our customers to competitive multi-channel video providers such as DBS, SMATV and wireless, that are not subject to leased access requirements.

V. <u>Alternative to Cost/Market Formula</u>

If the Commission firmly believes that the highest implicit formula results in prices being too high, we strongly urge the Commission not to adopt the proposed formula which will result in leased access prices that are extremely low, or free. Clearly, if an alternative is not found, operators and subscribers will be outraged by the proliferation of programmers looking for cheap distribution sources, which will drive current channels off the system.

We oppose the cost/market approach on principle, most notably because of the potential of "free" access under the proposed formula. Also, the existence of programmers who are successfully leasing channels at rates under the present formula indicate that drastic reductions are not necessary. If, however, the Commission remains convinced that the present formula needs to be changed, we strongly advocate a fair and reasoned transition period.

In recognition that the immediate channel capacity problems faced by many cable systems will be eased as upgrades take place, the FNPRM (Appendix E) includes a proposed transition mechanism that would retain but gradually reduce the current, highest implicit channel charge over the next three years until April 1, 1999, when channel charges based on the cost/market formula would go into effect. While we concur in principle with the proposed phase-in, we believe that for systems experiencing a shortage of channel capacity, the transition should be more gradual. We hope that the Commission will adopt a formula that produces a more reasonable rate than does the current proposal; however, if the rules that are adopted produce a significant reduction in current rates, we support a five-year transition period rather than the three years currently proposed. Furthermore, we believe that commercial channel leases should in no case be free; there should be a minimum fee or "floor" for leasing a channel.

If the Commission retains some variation of the cost market formula as the eventual method of establishing rates, it should eliminate the requirement of deducting license fees. In paragraph 83 of the FNPRM, the Commission believes that program license fees that an operator does not have to pay because a channel has been bumped is a cost savings which should be factored in as a negative when calculating net opportunity costs. We disagree with the Commission's position because the decrease in license fees will result in a reduction of external costs that are being passed through to the customer. Consequently, for the operator, there is no savings from the reduced costs. These savings must be passed through in the form of rate reductions for the tier on which the channel was carried.

Another option would be adoption of a mechanism similar to the "social contract" used in the rate context, in which the Commission would negotiate the timing for a particular company or system to make additional capacity available for leasing at lower rates, based on such factors as: (i) the existence of firm plans for an upgrade of capacity, and the schedule for completion; (ii) the current level of diversity of programming on the system; and (iii) the existence of some leased access usage. This approach would have the added advantage of serving as an incentive for rebuild and upgrade of systems.

VI. Redesignation of "Bumped" Channels

In paragraph 100 of the FNPRM, the Commission proposed that an operator's selection of the designated channels must be binding, and the Commission tentatively concluded that operators be allowed to redesignate their channels on an annual basis. The Commission recognizes that the popularity and profitability of certain channels can unexpectedly change and operators may need to redesignate their channels that could be bumped. We believe that if the Commission retains the proposed cost/market approach, only allowing changes once a year is too restrictive and contradictory to the Commission's previously allowed quarterly changes for the addition of programming. We believe that if we are allowed to change programming and subscriber rates quarterly, then this same flexibility should apply to changes in the designated channels for the purpose of determining leased access rates. Otherwise, the requirements are conflicting and could limit the Commission's goal of adding new programming.

For example, if an operator, who is out of capacity, wishes to add a new channel being heavily requested by his subscribers, he must drop an existing lesser-viewed service. Or, if the operator has capacity, he must use an existing dark channel. If either the lesser viewed channel or the dark channel were designated channels, the operator most likely could not enter into a mutually beneficial carriage agreement if the new programmer must consent to the possibility of being bumped. This would result in higher license fees to the operator, and ultimately to the subscriber. An alternative would be to allow the operator to re-prioritize his channels and designate another lesser-viewed channel or one whose contract has recently expired.

VII. Part-Time Carriage

As noted above, much of the successful leased access usage on our system involves part-time lessees rather than entities programming a full channel. Part-time leased access serves the needs of programmers seeking a regular channel slot and time not available through public access channels or other means. Thus far, we have been able to schedule such part-time use so as to satisfy programmers' desire to reach certain audiences while making efficient use of limited channel capacity. Because of the channel crunch, an influx of competing part-time leasing requests for the same time slots could cause a problem. We strongly agree with the Commission's tentative conclusion concerning the requirement to open another channel when the system's first channel set-aside is not fully leased. A system should not be required to make a new channel available unless the part-time lessee commits to lease a minimum amount of channel time. To deprive subscribers of an existing full-time service or to foreclose addition of a full-time non-leased service in order to accommodate a short-term lessee of a small amount of channel time hardly serves the public interest.

VIII. Verification of Rates

Lastly, the Commission has proposed the use of an independent certified public accountant to review the leased access rate and make an independent determination of the maximum rate as a means to settle complaints. We agree that this is a fair way to resolve disputes while streamlining the complaint process before the Commission. We also agree that if the operator and leased access programmer cannot agree on a mutually acceptable accountant, the operator may select any independent certified public accountant. The Commission has solicited comment on how the accountant's expenses should be paid. We believe that the leased access programmer should pay the full cost of the accountant's expenses unless the results demonstrate that the operator's maximum rate was more than 15% too high. If the results show the rate was more than 15% too high, then the operator should bear the expenses. This policy is consistent with many programming contracts regarding the audit of license fees, but the error threshold is generally 10%. However, the determination of license fees is a very objective process while the calculation of leased access rates under the proposed methodology in the FNPRM is subjective in regards to lost opportunity costs. Consequently, the error threshold should be higher due to the subjective nature of the calculation.

IX. Conclusion

Buckeye Cablevision appreciates the Commission's solicitation of industry comment on this important issue. We urge the Commission to consider the impact on subscribers and existing programmers when determining leased access rates. We also urge the Commission to consider the unfair competitive advantage conferred on our competitors (SMATV, DBS and wireless cable), that are not required to fill channels with programming with little or no audience appeal. If popular programs are removed from cable systems to accommodate infomercial channels and other programming that subscribers find unappealing, the consumer outcry will be enormous. Eventually, customers will abandon cable television service for other distributors that are not subject to leased channel requirements. For all of these reasons, we strongly suggest reconsideration and rejection of the proposed cost/market formula. We urge the Commission to consider how low leased access rates should be before the diversity and quality of programming on cable systems suffers

Respectfully submitted,

BUCKEYE CABLEVISION, INC.

By: David G. Huey
Name: David G. Huey
Title: President and General Manager

Date: 5/13/96

5566 Southwyck Boulevard
Toledo, OH 43614

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ATTACHMENT A

PROFORMA OF LEASED ACCESS RATES UNDER 3/29/96 FNPRM
BUCKEYE CABLEVISION, INC.

	CATV BASIC TIER				SATELLITE TIER					
DESIGNATED CHANNELS	CHANNEL 1	CHANNEL 2	CHANNEL 3	CHANNEL 4	CHANNEL 5	CHANNEL 6	CHANNEL 7	CHANNEL 8	CHANNEL 9	TOTAL
AVERAGE SUBSCRIBER REVENUE PER TIER ($10.53/19 CHS.; $12.13/27 CHS.)	0.554	0.554	0.554	0.554	0.449	0.449	0.449	0.449	0.449	
NET LOST OPPORTUNITY COSTS	(0.060)	0.000	0.000	0.000	0.000	0.080	(0.110)	(0.185)	0.000	
TOTAL	0.494	0.554	0.554	0.554	0.449	0.529	0.339	0.264	0.449	
TIMES NUMBER OF SUBSCRIBERS ON TIER	X 126,724	X 126,724	X 126,724	X 126,724	X 125,116	X 125,116	X 125,116	X 125,116	X 125,116	
	$62,601.66	$70,205.10	$70,205.10	$70,205.10	$56,177.08	$66,186.36	$42,414.32	$33,030.62	$56,177.08	$527,202.42
DIVIDED BY THE NUMBER OF SET ASIDE CHANNELS										/ 9 CHS.
MAXIMUM MONTHLY RATE FOR FULL TIME CHANNEL										$58,578.05

NOTES:

1. Our current price for the 19 channel CATV Basic tier is $10.53 and $12.13 for the 27 channel satellite tier.
2. Net opportunity costs shown above as a negative amount represent cost savings (i.e. license fee savings) from dropping the channel as required by the FNPRM. Of course, our rate to our subscribers would also have to be reduced due to the reduction of external costs. Thus, it is not really a savings to the operator.

   The net opportunity costs shown as a positive amount represent lost commissions from a bumped shopping service. Most channels have no lost opportunity costs because there are no advertising or commisssion revenues derived from them and they have no license fees to us

RATE TO BE CHARGED TO LEASED ACCESS PROGRAMMER:

	CHANNEL ON CATV BASIC TIER	CHANNEL ON SATELLITE TIER
MAXIMUM AMOUNT PER ABOVE	$58,578.05	$58,578.05
LESS AVG. SUBSCRIBER REVENUE THAT WE RECEIVE (.554 OR .449 TIMES SUBS)	(70,205.10)	(56,177.08)
MONTHLY FEE TO PROGRAMMER	$0.00	$2,400.96
HOURLY RATES	**$0.00**	**$3.33**